

DEC 21 1988

Federal Communications Commission
Office of the Secretary

December 21, 1988

BEFORE THE

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WASHINGTON, D. C.

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Inquiry Into the Availability of) MM Docket No. 88-138
Broadcast Television Signals on)
Cable Television Systems)

SUPPLEMENTAL COMMENTS OF THE ASSOCIATION
OF INDEPENDENT TELEVISION STATIONS, INC.

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December 21, 1988

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SUMMARY

The Commission's Cable System Broadcast Signal Carriage Survey Report and NCTA's Broadcast Station Carriage Survey reveal alarming information concerning the breadth of non-carriage of free local television stations by cable systems in the absence of must-carry rules. While both Reports are flawed, the FCC Report, based on information submitted voluntarily by cable operators themselves, indicates that non-carriage of local stations by cable systems is commonplace and rampant, involving millions of cable subscribers and thousands of instances of non-carriage by at least 20 percent of all cable systems. NCTA's study, which measured non-carriage of a different and smaller class of "local" stations, paints a much rosier but still disturbing picture.

The Commission should act upon this information by commencing an inquiry to determine whether cable systems, in refusing to carry hundreds of locally-oriented free television services, are failing to provide their subscribers with adequate diversity of information sources and services, and whether it should "promulgate any additional rules necessary to provide diversity of information sources" pursuant to Section 612(g) of the Cable Act. INTV is today filing a "Petition for Notice of Inquiry" to this end.

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OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. ("INTV"), by its attorney and pursuant to the Commission's November 21, 1988 Order Reopening the Period for Filing Comments in this proceeding, hereby submits its Comments on (1) the Mass Media Bureau's Cable System Broadcast Signal Carriage Survey Report, released September 1, 1988 (the "FCC Report"), and (2) the National Cable Television Association Report, Broadcast Station Carriage Survey (September 1988) (the "NCTA Report"). The FCC Report sought to measure the frequency of cable system non-carriage of local television stations that would have been entitled to carriage under the "must-carry" rules in effect for 20 years before their invalidation in the Quincy case,^{1/} while the NCTA Report studied non-carriage of stations entitled to carriage under the less inclusive "compromise" must-carry rules adopted by the Commission after the Quincy decision and in-

^{1/} Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 2889 (1986).

validated in the Century decision.^{2/} INTV herein also proffers a concrete suggestion for a statutorily authorized response by the Commission to the pervasive problem of cable system deletion or non-carriage of local free television stations revealed in the FCC Report.

INTV is the principal industry association of America's local independent television stations, representing approximately 175 stations which are not affiliated with the three major television broadcast networks.

I. Comments on the FCC Report

The FCC Report was issued and forwarded to the Congress without the benefit of any analysis, findings or conclusions. This is puzzling, inasmuch as the Report contains a wealth of truly alarming and damning information concerning the breadth of non-carriage of free local television stations by cable systems in the absence of must-carry rules.

The utility of the FCC Report is severely limited for two reasons: (1) the data submitted by cable systems was on a purely "voluntary" basis,^{3/} and the Commission "had to rely on the [cable operator] survey participants for the accuracy of the data provided,"^{4/} meaning that every misstatement or understatement of the number of former "must-carry" local stations denied carriage

^{2/} Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

^{3/} FCC Report at ¶ 2.

^{4/} Id. at ¶ 3.

by a cable system has gone undetected; and (2) only 50.6 percent of the cable systems surveyed returned their questionnaires at all.^{5/} As the Report acknowledges (but downplays), this may result in an inherent "response bias,"^{6/} in that the nearly 50 percent of the nation's cable systems that did not return their questionnaires may have chosen not to "volunteer" information on the degree of their non-carriage of local television stations. That is, the over 4,000 cable systems that did not respond to the Commission's survey are more likely to be the ones that had more to hide than those that voluntarily disclosed local signal carriage information.

Even the incomplete and probably skewed data submitted by cable systems to the Commission, however, demonstrates graphically that denial of carriage of local television stations by cable systems is extremely widespread. The Report reveals, among other things, that:

- (1) Of the 912 television stations reporting, 280, or nearly one-third, have been denied carriage in 1,533 instances.^{7/}
- (2) Of the 4,303 cable systems that voluntarily disclosed data to the FCC, 869 systems have denied carriage to 704 television stations in 1,820 instances.^{8/} Moreover, 279 of the stations dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited "compromise" post-Quincy

^{5/} Id. at ¶ 2.

^{6/} Id. at ¶ 6.

^{7/} Id., Table 1.

^{8/} Id., Table 2.

must-carry rules agreed upon by both the cable and broadcast industries.^{9/}

- (3) 241 of the reporting cable systems have denied carriage to three or more local stations, and 113 systems have denied carriage to four or more stations.^{10/}
- (4) The vast majority of local independent stations dropped by responding cable systems -- at least 378 of 485 (78%) -- were located within 50 miles of the cable headend.^{11/}
- (5) By far the most frequent replacement for a dropped local television station is a basic cable network -- the program services in which cable operators often own equity interests and/or profit from local advertising sales.^{12/}
- (6) 974 of the cable systems who supplied information to the FCC reported that they had repositioned one or more local station signals in almost 3,000 instances.^{13/} Moreover, only 15% of the instances of repositioning were attributed to "technical" as opposed to "marketing" reasons.^{14/}
- (7) In 326 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these instances involved cash payments, and in two cases these payments exceeded \$45,000 per year.^{15/}

^{9/} Id., Table 2A. INTV recognizes that these figures are extrapolated and therefore approximate. See Section II infra.

^{10/} Id., Table 4.

^{11/} Id., Table 7.

^{12/} Id., Table 8. See discussion infra at 7.

^{13/} Id., Table 10.

^{14/} Id., Table 13.

^{15/} Id., Table 14. 120 instances of cash payments and an additional 30 instances of a "combination" of considerations were reported. Id.

It bears repeating that these are numbers supplied voluntarily by the one-half of the cable systems surveyed by the Commission that returned their questionnaires. Even among these systems that came forward, more than 20 percent (869 of 4,303 systems) have dropped one or more local stations from their channel lineups in 1,820 instances. If one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did not disclose information to the FCC is roughly the same (and that none of the reporting cable systems understated their non-carriage of local stations), it would mean that approximately 1,700 cable systems have denied carriage of local free television stations in approximately 3,600 instances. Thus, any way that one looks at these numbers, the FCC Report reveals clearly that non-carriage of local stations by cable systems is commonplace and rampant, numbering in the thousands in terms of both cable systems and incidences of non-carriage.

II. Comments on the NCTA Report

In stark juxtaposition to the findings of the FCC Report is the NCTA Report. Thus, while the FCC Report found that over 20 percent of reporting cable systems were refusing carriage to local television stations, NCTA's Report finds that the systems that participated in its survey are carrying 98 percent of all "qualified" local signals.

A partial answer to this discrepancy is methodology. Among other things, the FCC and NCTA surveys sought different information: the FCC sought to determine the number of local stations entitled to carriage under the pre-Quincy must-carry rules that are being denied carriage, while the NCTA survey sought to measure the degree of non-carriage of a far narrower class of local stations that were "qualified" for carriage under the compromise "post-Quincy" must-carry rules that were invalidated in Century.^{16/} It may also be that, despite the NCTA survey's fair definition of "qualified" stations under the post-Quincy rules, some respondents did not list non-carriage of such stations that were nevertheless ineligible for mandatory carriage under these complex rules.^{17/} Thus, the NCTA Report does not measure non-carriage of "local" stations as that term was understood by the Commission for 20 years, but instead purports to measure non-carriage of a smaller subset of local stations under an industry compromise that was acceptable to NCTA and most of its members in 1986.^{18/}

^{16/} For example, a station whose community of license was more than 50 miles from the cable system's "principal" headed was not "qualified" for carriage, even if its transmitter was much nearer and/or it placed a clear over-the-air signal over the cable community.

^{17/} For instance, no local stations were mandatory signals on cable systems with 20 or fewer channels under the post-Quincy rules. See 47 C.F.R. § 76.56(a)(2)(1987)(deleted).

^{18/} INTV submits that the FCC Report may be the more accurate measure, inasmuch as virtually all cable systems were familiar with their local signal carriage obligations in effect for two decades until July 1985, while many systems
(continued...)

Even so, it is difficult to explain the degree of the discrepancy between the FCC and NCTA surveys. Another possible partial explanation for the gulf between the two studies is that only 39 percent of the cable systems surveyed by NCTA returned their questionnaires.^{19/} Thus, notwithstanding NCTA's assertion that "it is reasonable to assume that the survey data are representative of cable system carriage of broadcast stations,"^{20/} a very significant "response bias" may be present in the NCTA Report. Put another way, the more telling information regarding the degree of cable non-carriage of local free television stations may remain in the hands of the 61 percent of the nation's cable systems that did not deign to respond to NCTA's survey.

Thus, the best that can be said about the NCTA Report is that it paints a rosier picture of its members' carriage of local television stations than does the Commission's survey of the same cable systems. However, even shown in its best light, the NCTA Report reveals that 205 of the cable systems that chose to provide information to NCTA are not carrying, and 2.5 million cable subscribers are not seeing, all the local stations "qualified" for carriage even under the watered-down "post-Quincy"

^{18/}(...continued)

might be unfamiliar with and therefore inaccurate in reporting "qualified" station carriage under rules that were in effect only 16 months, and even then were under the cloud of a judicial challenge.

^{19/} NCTA Report, Executive Summary at 1-2.

^{20/} Id. at 2.

must-carry rules.^{21/} Moreover, the Report shows that 65 percent of the dropped local stations were replaced by basic cable networks,^{22/} in which cable operators often have ownership interests and/or sell advertising time.

One can only speculate as to why nearly twice as many systems did not provide information to NCTA as those that did. Without the input of these systems -- the ones which may have demurred from participating because their disclosures might cast them in an unfavorable light -- the NCTA Report sees, hears and speaks relatively little evil.

III. The Commission Should Commence an Inquiry Under Section 612(g) of the Cable Act

The FCC Report, though incomplete, conclusively demonstrates that very many local free television stations are being denied carriage on cable systems. The Commission should act upon this information by commencing an inquiry to determine whether cable systems, in declining to carry hundreds of locally oriented free television services, are thereby failing to "assure that cable systems are responsive to the needs and interests of the local community" and are depriving their subscribers of "the widest possible diversity of information sources and services to the public."

These are not mere catch-phrases: rather they are explicit statutory purposes of the Cable Communications Policy Act of

^{21/} See NCTA Report at 7, Table 1.

^{22/} Id. at 12.

1984. See 47 U.S.C. § 521(2), (4). Moreover, Section 612 of the Act, the purpose of which is to "assure that the widest possible diversity of information sources are made available to the public from cable systems," 47 U.S.C. § 532(a), contains a much-overlooked provision which provides the Commission with a statutory vehicle to assure, or restore, that diversity. Subsections (b) through (f) of Section 612 attempt to secure this diversity through cable leased channel access requirements designed to "separate editorial control over a limited number of cable channels from the ownership of the cable system itself"^{23/}; but subsection (g) independently states:

Notwithstanding sections 541(c) and 543(a) of this title [which provide, respectively, that cable systems shall not be regulated as common carriers and that cable rate regulation is generally prohibited], at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources. 47 U.S.C. § 532(g).

Congress "recognize[d] that the cable industry, and in particular the programming sector of the industry, [was] still in a developmental stage" in 1984, and in adopting Section 612(g) it explicitly empowered the Commission to promulgate additional regulation of cable to assure diversity "as the cable industry

^{23/} H.R. Rep. No. 934, 98th Cong., 2d Sess. 31 (1984).

develops and serves more citizens in the future."^{24/} Congress contemplated that such a revisitation by the Commission would be appropriate at such time as 36-channel cable systems passed 70 percent of households nationally, and 70 percent of the households passed subscribed to such systems. Although Congress did not envision full-scale common carrier regulation of cable,^{25/} it clearly contemplated a common carrier-like "separations" policy with respect to "a limited number of cable channels."^{26/}

INTV is unable to determine with precision whether 36-channel or larger cable systems already pass 70 percent of the nation's television households and are subscribed to by 70 percent of the households passed, but available estimates seem to indicate that this threshold has either been crossed or will be crossed in the immediate future. Cable systems overall now pass about 82 percent of all television households and are subscribed to by 53.8 percent of all households.^{27/} In addition, as of April 1, 1988, cable systems with 30 or more channels served over

^{24/} Id. at 54. Although the House Committee Report focuses on leased access channel requirements, the broad authority provided in Section 612(g) to "promulgate any additional rules necessary to provide diversity of information sources" is wholly independent of the leased access provisions in subsections (b) through (f) and, consistent with the broad declaration of purpose in Section 612(a), cannot be read as limited to leased access requirements.

^{25/} Id.

^{26/} See id. at 31.

^{27/} Broadcasting, Dec. 19, 1988 at 12.

81 percent of all cable subscribers.^{28/} Accordingly, it appears that the time is ripe, or will be imminently, for the Commission to consider whether "additional rules [are] necessary to provide diversity of information sources." 47 U.S.C. § 532(g). The Commission would also be free to consider whether common carrier-like separations requirements should be applied to any such new rules.

INTV submits that, in view of the significant extent to which local free television stations are being denied carriage on cable systems and are being supplanted by basic cable networks in which the cable operators have financial interests and/or sell advertising in competition with local stations, such an inquiry by the Commission is warranted and timely. As The Wall Street Journal has reported, "cable system owners have taken minority interests in virtually every new programming channel that has started in the past two years."^{29/} Indeed, as a practical matter, it has become impossible for anyone to launch a new cable program service without surrendering equity interests to the cable MSOs whose "buy/no buy" decisions will spell success or failure for the new service. As INTV has shown in this proceeding,^{30/} this vertical integration has transformed cable's role from that of a passive retransmitter of programming, including

^{28/} 1988 Television & Cable Factbook, Cable & Services Volume, p. C-359.

^{29/} The Wall Street Journal, May 4, 1988 at p. 28.

^{30/} See, e.g., INTV Comments in MM Docket No. 88-138, filed July 8, 1988.

local broadcast programming, to that of a financially interested distributor of both (1) cable program services in which the system owner holds equity interests and/or sells advertising availabilities, and (2) local free television broadcast signals which compete for audience with those cable services in which the system owner has such direct financial interests. The clear conflict of interest between cable's traditional role as distributor of broadcast programming and its growing new role as programmer-competitor of broadcasters has resulted, as demonstrated by both INTV and more recently in the FCC Report, in the deletion of many local independent broadcast signals from cable systems and the shifting of the cable channel placements of many others in favor of far less popular cable program services -- the ones in which the MSOs hold interests. The veracity of INTV's case histories of anticompetitively motivated signal deletions and repositionings has been independently confirmed,^{31/} and the NCTA Report itself confirms that 65 percent of local stations dropped from cable systems have been replaced by basic cable services. See NCTA Report at 12.

Even in 1984, in enacting Section 612(a) of the Cable Act, the statute's authors recognized that "cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering ... competes with a program service already being

^{31/} See "Muddling Through the Must-Carry Mess, Channels, September 1988, at p. 48.

provided by that cable system."^{32/} No additional signal carriage regulation was necessary in 1984, inasmuch as the Cable Act explicitly retained and indeed found a continuing need for the must-carry rules.^{33/} However, it has become alarmingly apparent that cable operators in a post must-carry environment have too often chosen to eliminate the program offerings of local independent television stations in favor of competing program offerings in which they have an equity stake or through which they profit through local advertising sales. The Commission should seriously consider whether it should "separate editorial control" over a larger number of cable channels "from the ownership of the cable system."^{34/}

Conclusion

In view of the incomplete but chastening data compiled in the Commission's "Cable System Broadcast Signal Carriage Report," INTV respectfully submits that the Commission should at least commence an inquiry to ascertain whether additional cable rules "to provide diversity of information sources" under Section

^{32/} H.R. Rep. No. 934, supra, at 48.

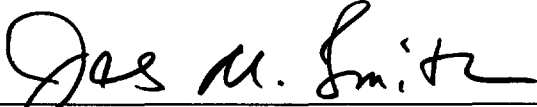
^{33/} See Cable Act § 624(f)(2); H.R. Rep. No. 934, supra, at 70 ("Regulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements"); S. Rep. No. 67, 98th Cong., 1st Sess. 11-12 (1983) ("if the 'must carry' rules were eliminated, local cable operators might not carry some local broadcast stations, or would be in a position to charge an unreasonable price to let a broadcaster on their systems...[T]he committee sees a need to continue the existing 'must-carry' rules to protect the public interest").

^{34/} H. R. Rep. 934 at 31.

612(g) of the Cable Act are necessary and appropriate at this time. To that end, INTV is today filing separately a "Petition for Notice of Inquiry" seeking the institution of such an inquiry.

Respectfully submitted,

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